STATE OF MICHIGAN

COURT OF APPEALS

JOHN E. SAMPLES,

Plaintiff-Appellant,

v

BOTSFORD GENERAL HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
June 5, 2007

No. 272365
Oakland Circuit Court
LC No. 2005-065224-CL

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's opinion and order granting defendant summary disposition for plaintiff's wrongful discharge claim. The trial court initially granted defendant summary disposition under MCR 2.116(C)(10) on plaintiff's age discrimination claim but denied summary disposition on plaintiff's wrongful discharge claim. After defendant filed a motion to reconsider that decision, the trial court ruled in favor of defendant, granting it summary disposition in full. We affirm.

Plaintiff argues that the trial court erred when it held that defendant's policies and procedures did not create a legitimate expectation of just-cause employment as a matter of law. We review a trial court's decision on a motion for summary disposition de novo. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). Considering the record including pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the non-moving party, summary disposition under MCR 2.116(C)(10) is appropriate when no genuine issue of material fact exists. *West*, *supra* at 183. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *Id*.

Michigan law presumes that employment is "at will." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998). But an employee may overcome the presumption by providing sufficient evidence that one of the following exists: (1) a contractual provision for a definite term of employment; (2) a clear and unequivocal, express agreement regarding job security; or (3) an implied-in-law contractual provision arising from the employer's policies and procedures that instill a legitimate expectation of job security. *Id.* at 164.

Plaintiff argues that defendant's handbook, employment application, and progressive disciplinary process created a legitimate expectation of job security and just-cause employment. When an implied-in-law contract is implicated, we follow a two-step analysis. *Id.* First, we

determine "what, if anything, the employer has promised;" then we determine if "the promise is reasonably capable of instilling a legitimate expectation of just-cause employment in the employer's employees." *Rood v General Dynamics Corp*, 444 Mich 107, 138-139; 507 NW2d 591 (1993). The policies and procedures that form the basis of the "promise" must be reasonably related to employee termination. *Id*. at 139. A policy may be a promise if it clearly manifests an intention "to act or refrain from acting in a specified way," and so justifies the employee's understanding that a commitment has been made. *Id*. However, "an employer's policy to act or refrain from acting in a specified way if the employer chooses is not a promise at all." *Id.* When the employer policy statements regarding employee discharge cannot be reasonably interpreted as promising just-cause employment, summary disposition is appropriate. But if the employer policy statements relating to discharge are capable of two reasonable interpretations, summary disposition is inappropriate to decide the question of fact. *Id.* at 140-141.

Plaintiff's first claim, that the employment application created an expectation of just-cause employment because it provided that false statements were "sufficient cause" for discharge, ie, that listing one potential reason for firing means or implies that some cause is required for termination, is without merit. A statement that certain behavior is grounds for termination does not create just-cause employment. An employer may specify that certain behavior will most certainly result in discharge while at the same time reserve the right to discharge for any other reason. *Id* .at 142; *Biggs v Hilton Hotel Corp*, 194 Mich App 239, 242; 486 NW2d 61 (1992).

Plaintiff next claims that defendant's policy which states "[c]ontinued employment during the probationary period is solely at the discretion of the Hospital and the new employee may be terminated at any time for any reason without re-course to the Appeals Procedure" established a legitimate expectation of just-cause employment. This argument is also without merit because a probationary period alone is not sufficient to overcome the presumption of at-will employment. *Rood, supra* at 141; *Kostello v Rockwell Int'l Corp*, 189 Mich App 241, 245; 472 NW2d 71 (1991). Some other statement is necessary to create that expectation.

Plaintiff's argument focuses on some of the language in defendant's employee handbook; however, we conclude that the handbook's policies and procedures cannot create a legitimate expectation of just-cause employment as a matter of law. The handbook does not state that discharge will only be for cause. Further, defendant's statement that discipline will be applied when there is "reasonable cause" to believe a work rule has been violated does not rise to the level of an enforceable promise to terminate only for cause and cannot create a reasonable expectation of just-cause employment. *Lytle, supra* at 165-166. Although defendant's detailed "General Work Rules" define major and minor infractions and provide examples of each, they do not state that termination will be for one of the enumerated reasons only and do not create a just-cause employment. *James v City of Burton*, 221 Mich App 130, 133; 560 NW2d 668 (1997). In addition, the fact that defendant adopted guidelines and procedures for dealing with employee misconduct does not create just-cause employment. *Biggs, supra* at 241-242. Rather, the adoption of a "nonexclusive list of common-sense rules of behavior that can lead to disciplinary action or discharge clearly reserves the right of an employer to discharge an employee at will," Rood, *supra* at 142, and the import of such a reservation should put the employee on notice of the employer's reservation.

Even when considered together, the policies and procedures cannot be interpreted as promising just-cause employment. Defendant has not made specific promises that rise to the level of a commitment to terminate an employee only for cause.

Where a handbook contains mixed messages or lends a possible inference that just-cause employment may exist, it does not automatically create a question of fact for a jury. Rather, the "plaintiff must still provide sufficient evidence to raise a triable question that the policy arguably instilled a legitimate expectation that superseded the express contractual disclaimer." *Lytle, supra* at 170 n 16. Plaintiff has not done so. Further, at-will and just-cause employment are the extremes that lie on the opposite ends of a continuum. An employer may put some limits on its ability to discipline and discharge an employee without creating a just-cause employment. *Thomas v John Deere Corp*, 205 Mich App 91, 93-95; 517 NW2d 265 (1994). Therefore, we conclude that plaintiff has failed to show that defendant's employment policies are subject to two reasonable interpretations; summary disposition was appropriate.

Plaintiff next argues that the trial court erred by ruling that because it was unrelated to termination, defendant's appeals procedure, including an arbitration provision, could not be considered when determining whether defendant's policies created a legitimate expectation of just-cause employment. After a review of the trial court's decisions, we conclude that plaintiff has misinterpreted the trial court's ruling. Originally, the trial court seemed to conclude that the fact that defendant would be bound by an arbitrator's ruling meant that it could not be an at-will employer, in effect holding that binding arbitration created just-cause employment. The law is clear that it does not; binding arbitration can coexist with at-will employment. *Hicks v EPI Printers, Inc*, 267 Mich App 79, 85-86; 702 NW2d 883 (2005). Thus, the trial court's ruling after reconsideration correctly reflects the fact that a binding arbitration clause does not determine whether employment is at will or just cause. The post-termination arbitration procedure is an employee benefit and not a condition precedent to termination.

Plaintiff makes a similar error in interpretation when it argues that the trial court erred when it held that the appeals and arbitration process was not reasonably related to termination. The trial court did not make that finding. It properly ruled that defendant's appeals and arbitration process did not create a legitimate expectation of just-cause employment. An employer that agrees to be bound to an employment policy does not necessarily promise to terminate for just-cause only, *Biggs, supra* at 241-242, and the adoption of a binding arbitration policy does not convert at-will employment into just-cause employment. *Hicks, supra* at 85-86. Therefore, the trial court did not err.

Plaintiff's final argument on appeal is that whether there was just cause to terminate him was a question for the jury because defendant selectively enforced its policies and unfairly terminated plaintiff. We conclude that plaintiff was properly discharged for cause; consequently, there was no genuine issue of material fact for the jury to determine.

If an employment relationship is just-cause, the question of whether an employee's termination was for "just" cause is a question of fact for the jury, *Toussaint v Blue Cross & Blue Shield of MI*, 408 Mich 579, 621, 623; 292 NW2d 880 (1980), unless the employer has reserved to itself sole discretion to determine what is "just" cause. *Thomas, supra* at 95. Although defendant argued otherwise, it failed to clearly and explicitly reserve for itself sole discretion to determine whether just cause existed for termination. Nevertheless, where there can be no

question of material fact that the employee violated an employer's policy, and the employer followed the procedures outlined in the handbook that created the just-cause employment, just cause may be found as a matter of law. *Loftis v GT Products, Inc*, 167 Mich App 787, 793-794; 423 NW2d 358 (1988); *Obey v McFadden Corp*, 138 Mich App 767, 780-781; 360 NW2d 292 (1984).

Plaintiff admits that he made a serious error in judgment when he sent the sexually explicit email to two of his coworkers and that defendant had reasonable cause to believe he violated a work rule. He admitted that he knew sending sexually explicit materials over defendant's computer network violated the electronic communications policy and that the violation was grounds for termination. Even were we to decide that his employment was "just-cause", we cannot conclude that any question of material fact existed that plaintiff was terminated for just cause.

Plaintiff correctly notes that where an employer selectively enforces policies, the employee is entitled to have the trier of fact determine whether the termination was for "just" cause. *Toussaint, supra* at 624. However, plaintiff has presented insufficient evidence to raise a question of selective enforcement. Although he noted several other employees who were warned under the progressive discipline process before they were terminated, only one of those employees sent and received sexually explicit emails, and he too, was terminated immediately. In addition, the coworker who received and forwarded plaintiff's email was also terminated. He was reinstated after appeal because he had an otherwise unvarnished work record. Moreover, defendant terminated plaintiff not just for the sexually explicit email, a "major infraction" and grounds for discharge, but also for excessive personal use of defendant's email system, another "major infraction" and grounds for discharge. Plaintiff has simply failed to provide any evidence that defendant did not terminate employees who committed both infractions; therefore, he has not met his burden of raising a question of fact regarding selective enforcement. Because he admitted there was cause for his termination and because the rules were not selectively enforced, we conclude that there was no question of material fact for a jury to resolve. Summary disposition was appropriate.

Defendant also argues that because plaintiff sought to gain the benefits of the just cause employment "contract," he is bound by the other provisions of that contract, namely, binding arbitration. We agree, but we need not address this issue in view of our above analysis.

We affirm.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey